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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reexamination of the Comparative)
Standards for Noncommercial)
Educational Applicants)

MM Docket No. 95-31

To: The Commission

COMMENTS OF FAITH BROADCASTING, INC.

Faith Broadcasting, Inc. (hereafter "Faith"), by its undersigned counsel and pursuant to the Commission's FURTHER NOTICE OF PROPOSED RULE MAKING (hereafter the "Notice"), FCC 98-269¹, in the above captioned proceeding, hereby respectfully submits these comments on the proposed standards for deciding among competing applicants for noncommercial, educational ("NCE") broadcast stations.²

I. BACKGROUND.

1. Faith is a non-profit, private educational organization which is recognized by the United States Department of the Treasury as tax exempt under Section 501(c)(3) of the Internal Revenue Code. It has also been recognized by the Commission as qualified to operate broadcast stations utilizing that portion of the FM band reserved for educational broadcasting. Faith is the Commission licensee of noncommercial educational broadcast stations WLBF(FM), Montgomery, Alabama, and WSTF(FM), Andalusia, Alabama.

¹ Released October 21, 1998.

² The deadline for filing comments was extended to January 28, 1999, pursuant to the Commission's Order in MM Docket No. 95-31, released on December 3, 1998, DA 98-2489.

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Accordingly, FAITH is familiar from a practical standpoint with noncommercial, educational licensing and broadcasting.

II. DISCUSSION

A. PROCEDURES ON RESERVED NCE SPECTRUM

Comparative Hearings Should Be Abandoned

2. Faith agrees with the tentative conclusions of the Commission that it is counter-productive to continue the use of the traditional comparative hearing process in deciding among competing applicants for NCE frequencies. The comparative hearing process is time consuming and expensive for the applicants, exhausts a great deal of the Commission's resources, and often results in a time sharing arrangement that is not feasible in implementation for, or acceptable to, the competing NCE applicants. However, while conserving resources and a speedy decision process are beneficial to all parties involved in a proceeding to decide among conflicting NCE applications, the Commission has a mandate under the Communications Act of 1934, as amended, (hereafter the "Act") to implement a procedure that comes to a determination on the "public interest standard" on a reasoned basis.

Lotteries

3. In the Balanced Budget Act of 1997, the Congress continued the authority of the Commission to use lotteries in resolving competing applications for NCE spectrum. However, Section 309 of the Act does not require, or even express a preference for, the use of random selection methods by the Commission in this regard. While lotteries may allow for a quick, less expensive process than other methods, any lottery is a method of random selection based solely on chance, and not on the relative merit of the NCE applications. Random chance simply does not allow the Commission to review and decide among competing NCE applicants based on the

superior public interest service that one of the competing applicants may provide, as is mandated by Congress under the public interest standards of Sections 309(a) and 307(b) of the Act. Moreover, as the Commission has found in the past in connection with lottery proposals for full-service broadcast stations, any potential gains in efficiency that may be realized by the use of random selection are significantly outweighed by the high probability that there will be a corresponding decrease in the quality of broadcast licensees and the service provided thereby to the public.³

4. The Notice recognizes the shortcomings inherent in lotteries and attempts to address them with a proposal for “weighing” lotteries through preferences based on certain “meritorious” criteria that can be claimed by applicants in order to “increase their chances” of selection. While these enhancements may render a lottery less arbitrary, this process still involves a determination based primarily on random selection, and continues to subject the selection of NCE applicants to the arbitrary laws of chance. Faith does not believe that the public interest mandate of the Act can be met through a process that is as heavily weighted by randomness as it is by applicant merit.

Comparative Point System.

5. The Commission’s point system proposal in the Notice has the benefits of being objective, inexpensive to utilize, and flexible enough to allow for a prompt resolution among diverse applicant groups. A point system has the added benefit of resulting in a comparative analysis that in which the “winner” is the applicant who proposes the most meritorious use of the rapidly depleting NCE spectrum. Simply stated, a point system will allow for the selection of the best-qualified applicant, not subject to chance, and better serves the public interest mandate of

³ *Random Selection of Broadcast Applicants*, 67 RR 2d 644 (1990).

the Act. However, the Commission must be careful in choosing the various criteria to which it will grant “merit points” in connection with such a system, or this process becomes as arbitrary as a lottery, and subject to applicant abuse through comparative “gamesmanship”.

6. The Commission must be aware that while certain characteristics of an applicant group may seem meritorious and deserving of enhancement points, only characteristics that are not subject to “comparative gamesmanship” should be accorded such credits. For example, the Commission’s Notice proposes “minority control credit” for applicants controlled both de jure and de facto by minorities, and a “local educational presence credit” for applicants whose governing boards are made up of local citizens in the proposed community of license. Faith’s experience has been that membership on the boards of non-profit corporations and organizations is subject to continual change as members leave the board and/or are replaced by others. Moreover, the addition of board members can render de jure control a de jure lack thereof. There is certainly no guarantee that a minority or locally controlled non-profit organization seeking a NCE license will continue to be a minority or locally controlled after the license is approved by the Commission. This view is supported by the recent history of the Commission’s well-intentioned policy of affording minority comparative credit in commercial broadcast hearings. Many applicants that were “minority controlled” during the FCC hearing phase suddenly became devoid of minority participation once the spotlight of the adjudicatory process turned off, and the grant of the minority-enhanced application became a “final order.” Moreover, as the Notice recognizes, the Commission is not required to include minority or local participation as enhancing factors in a point system under the Congressional mandate in the

enabling statute, the Budget Reform Act of 1997.⁴ Faith believes that the Congress would have instructed the Commission to implement a minority credit had it desired this to be an enhancement factor.

7. The proposal in the Notice for a “local diversity” credit based on an applicant’s proposed station not having contour overlap with the principal community contour of any commonly controlled broadcast station also involves a factor that is subject to the ability of applicants to make post-grant changes that remove the basis for this credit. While this concept would at first seem to have merit by apparently fostering broadcast diversity of ownership, and by penalizing a NCE applicant seeking a second NCE station in an area already served by another applicant-owned station, the underlying basis can be easily “massaged” by an experienced broadcaster with a good consulting engineer. It is a simple matter for a NCE applicant to configure the proposed service contours in a NCE application to avoid such overlap, and then to modify the proposal once a construction permit has been issued by the Commission, perhaps based on such a “credit”, to specify a new coverage pattern that would not have allowed it to qualify for this comparative enhancement.⁵

8. Faith submits that comparative credits based on easily modified criteria are incentives for applicants to “play the comparative enhancement game” and to create NCE applications intended to gain an advantage from such standards for comparative purposes,

⁴ The Commission has long recognized that minority ownership is not an element that can be considered in a Section 307(b) analysis of whether one applicant should be given a dispositive preference over another based on a more efficient use of the available broadcast spectrum. *See, Valley Broadcasters, Inc.*, 67 RR 2d 937 (1990).

⁵ Moreover, the Commission has previously found that since noncommercial educational channels are reserved for nonprofit, educational organizations so that such organizations may advance their educational goals and objectives, the ownership of other NCE stations by the applicant is “irrelevant” to a determination of which of two or more mutually exclusive noncommercial applicants would best serve

but without the intention of following through on these “enhancements” once the comparative victory is won. The Commission lacks the resources to monitor NCE applicants after their construction permits are granted to fully ensure that they live up to such “enhanced factor” promises. Thus, these types of credits are actually disincentives for applicants to act truthfully and in full candor with the Commission in the context of NCE applications. Faith would suggest the following comparative enhancements for a comparative NCE application point system adjudication process.

PAST NCE BROADCAST RECORD.

9. Faith submits that one point should be given to NCE applicants demonstrating a record of NCE broadcast station operation and service to the public for a period of at least ten (10) years prior to the filing date of its application. This credit should only be accorded to NCE licensees demonstrating that their ten-year or greater term of NCE broadcast station operation is untainted by fines, forfeitures or admonitions from the Commission in response to violations of the NCE broadcast rules.

10. The Commission has long recognized that the past broadcasting record of an applicant for a broadcast license is the “most reliable gauge” of the service that will be provided in the future.⁶ This finding has been upheld as a valid criterion for judging the merits of enhancements to applications under the public interest standard in the Act by the federal courts.⁷ Unfortunately, the growth of interest in NCE station operation by non-profit, educational entities has resulted increasingly in violations of the Commission’s rules limiting

the public interest, convenience and necessity under the Act. *Real Life Educational Foundation of Baton Rouge, Inc.*, 69 RR 2d 1043 (1991).

⁶ See, *Wabash Valley Broadcasting Corporation*, 1 RR 2d 573 (1963) and *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 18 RR 2d 1901 (1970).

⁷ *Central Florida Enterprises, Inc. v. FCC*, 683 F. 2d 503 (1982).

broadcast programming on reserved FM channels to a “non-commercial” basis. See, Letter to Agape Broadcasting Foundation, KNON-FM (DA 98-825), released May 1, 1998 and the cases cited therein. Faith submits that any applicant demonstrating a substantial and untarnished record of NCE broadcast station operation should be given one merit point.

COMPARATIVE COVERAGE

11. Faith agrees that NCE applicants proposing to more broadly serve the public should receive one merit point. This point should be given to an applicant proposing a NCE technical facility that will provide service within its 60 dBu contour that is at least a 10% greater service area than each of the other applicants.

UP-GRADES BY EXISTING STATIONS VERSUS AUTHORIZED, BUT UNBUILT STATIONS.

12. Faith is aware of conflicting NCE applications proposing modifications in the authorized facilities of a licensed and operating NCE station and an authorized, but unbuilt, NCE-FM station. Faith believes that NCE-FM stations that have been authorized and placed into operation should receive a dispositive comparative preference over a conflicting application proposing an increase in the authorized, but unbuilt, facilities of another NCE-FM station. NCE stations that are serving the public should be allowed to increase that service before an NCE-FM permittee of an unbuilt NCE station is allowed to occupy additional NCE spectrum with having an actual station that has been placed into operation. In the case of the permittee of an unbuilt NCE-FM station, the *sine quo non* for the submission of an application proposing an increase in facilities in conflict with a previously-filed upgrade by an existing NCE station should be the construction and commencement of operation by the station approved in the original NCE application. Faith submits that an “unproven” NCE permittee that may or may not one day

actually make good on its promise to build the NCE station for which it has been authorized should be required to place that station into operation before delaying the plans of an existing NCE licensee to up-grade the facilities of its operating station in order to provide greater service to the public. Thus, in a comparative NCE application proceeding involving only two such applicants the existing NCE licensee should receive a dispositive preference.

EDUCATIONAL INSTITUTIONS AND STATE NETWORKS.

13. Section 73.503 of the Commission's rules does not require that a NCE applicant be an accredited state, regional, or national educational organization.⁸ Nor does it require that such applicants be part of a "state-wide plan" for NCE broadcasting. In the past, the Commission has never given a comparative benefit to a NCE applicant based on its status as an educational institution, accredited or otherwise, or as a member of a state organized network or plan. The reason for this is clear. There is no statutory basis for according such a credit under any provisions of the Act. The Commission's Notice does not indicate that the Congress has mandated, or authorized, such a credit to be given in the comparative consideration of NCE applications in connection with the Tax Reform Act of 1997. Accordingly, Faith submits that there is no basis for the Commission allowing educational institutions or applicants who claim to be part of a state or municipal educational broadcasting "plan" to receive a merit point in connection with a point system in deciding among competing NCE applications.

B. BASIC ELIGIBILITY SHOWING.

14. As discussed in the Commission's Notice, there are a wide variety of entities that may be eligible to apply for reserved-band, NCE channels. Applicants must demonstrate that

⁸ *C.f. Lower Cape Communications, Inc.*, 47 RR 2d 1577 (1980).

they meet basic eligibility requirements as contained in the Commission's rules.⁹ The Notice indicates that the Commission does not propose to change these rules in the context of this rule making proceeding. While Faith does not believe that changes in the NCE rules are necessary, it would encourage the Commission to take steps to better ensure that applicants for NCE spectrum demonstrate at the time their applications are filed with the Commission that they are qualified to hold licenses to operate thereon.¹⁰ This can be demonstrated by the submission of two types of documentation with a NCE broadcast station application. First, the Commission should require applicants for new NCE stations to submit with their applications certificates showing that they are non-profit entities in good standing in the state in which they propose to operate the NCE station. In addition, NCE applicants should be required to submit copies of a written finding from the United States Department of the Treasury, Internal Revenue Service, that they have been determined to be either non-profit corporations, organizations or foundations meeting the standards for exemption from taxation under the Internal Revenue Code. Currently, the submission of this documentation is required for a finding by the Commission that a licensee or applicant is exempt from the payment of regulatory fees. See, 47 C.F.R. 1.1162(c) and the Commission's Public Notice "Verification of Exemption From Regulatory Fees Based on Non-Profit Status", DA 97-2507 (released November 28, 1997). The Commission should, therefore, require NCE FM applicants for new stations to submit this showing in connection with their fee-exempt, NCE applications to establish not only their fee-exempt status, but also their *bona fides* to apply for a NCE broadcast station.

⁹ See, 47 C.F. R. 73.205 and 73.606.

¹⁰ Existing NCE licensees have previously proven their qualification and should be merely required to certify their continued eligibility.

C. HOLDING PERIOD FOR NCE LICENSES.

15. Faith supports the Commission's proposal to implement a minimum holding period for NCE licenses awarded on the basis of a point system. Faith believes that such a policy will discourage speculators in NCE licenses who have no interest in serving the public through the operation of a NCE station. Faith would support a holding period of anywhere between three to five years. However, Faith believes that NCE licensees holding licenses issued pursuant to a point system should be allowed to donate such licenses to another non-profit, educational entity at any time. Such a donation, subject to the prior approval of the Commission, should only be allowed upon the certification by the parties that no consideration would change hands as part of, or in connection with, the donation. A donation without consideration to another non-profit, educational entity does not encourage speculation in NCE licenses and should, therefore, be an exception to the holding period policy.

D. NONCOMMERCIAL EDUCATIONAL APPLICANTS ON "COMMERCIAL" FREQUENCIES.

16. As noted previously, neither the Act nor the Commission's rules reserve any portion of the broadcast spectrum exclusively for the use of for-profit, commercial licensees. Accordingly, the Commission lacks statutory authority to preclude NCE applicants from submitting applications to utilize non-reserved FM channels or AM frequencies. Presumably Congress would have implemented such a restriction in connection with the Tax Reform Act of 1997 had the competitive bidding limitation to commercial broadcast applications adopted therein been intended to prompt the Commission to label NCE applications ineligible to apply for non-reserved channels. It did not do so. The intent of Congress is therefore clear. The restriction of its competitive bidding authority to situations involving only commercial broadcast

applicants, without a corresponding restriction against NCE applications applying for non-reserved channels, was not intended to prompt the Commission to change its current policy of allowing both commercial and NCE applicants to apply for non-reserved channels.

17. In cases in which there are both commercial and NCE applicants for non-reserved channels, Faith submits that the NCE applicants should be given a preference if it can be shown that there are no reserved NCE frequencies available that will allow a NCE licensee to serve the community to which the non-reserved channel is assigned with a 70 d/b/u service contour. In this case, the commercial applications should be dismissed, and any competing NCE applications should be processed pursuant to the NCE procedure adopted herein. On the other hand, if it can be shown that there are reserved-band, NCE frequencies available for use that will allow for coverage over the community of license with a 70 d/B/u contour, the NCE applications should be dismissed in favor of an auction among the commercial applicants. This procedure will allow for either commercial or NCE use of a non-reserved channel depending on whether there is a NCE alternative. Moreover, such a procedure renders the current process of having non-reserved channels allocated for NCE use unnecessary, since a non-reserved channel can be allocated to a community where there are no NCE channels available for use with a preference accruing to any the NCE applicants over any commercial applicants.

E. SECTION 307(b) CONSIDERATIONS.

18. While reexamining the comparative standards for NCE applications, the Commission must not lose sight of the requirements of Section 307(b) of the Act. That section provides, in pertinent part:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distributions of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

As the Commission has consistently found in the past, where applicants for conflicting NCE channels propose to serve different communities and areas, it must determine which of the proposals would best provide a fair, efficient, and equitable distribution of radio service. If the Commission can make a determination under Section 307(b) favoring one community over another then “only applicants specifying the favored community” are to be given comparative consideration. *Valley Broadcasters, Inc.*, 67 RR 2d 937 (1990). Noncommercial, educational radio stations are to be considered in a Section 307(b) analysis, and conflicting applications for NCE-FM stations involving different communities of license require, before any comparative analysis based on individual merit or “bonus points”, a determination whether one applicant should be granted on the basis of a dispositive Section 307(b) preference.

19. The Commission’s Notice seems to indicate that in connection with the comparative consideration of NCE applicants its Section 307(b) mandate can be reduced to the level of a lottery or point system enhancement. See, Notice at page 12, paragraph 21(B). However, where two or more NCE-FM applicants file conflicting applications proposing to serve different communities of license, the Commission must first make a determination under Section 307(b) of the Act whether one application should be approved based on the greater need for the use of the NCE-FM channel in that community. This determination must be made before the Commission undertakes the more mundane analysis of counting up points, or pulling the lottery winner out of a hat. Nothing in the enabling language in the Tax Reform Act of 1997 excuses the Commission from this obligation.

WHEREFORE, Faith Broadcasting, Inc. respectfully submits these comments to assist the Commission in formulating a legal and equitable basis for choosing among competing NCE applications.

Respectfully submitted,

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